

BEFORE THE INSURANCE COMMISSIONER  
OF THE STATE OF WASHINGTON

In the Matter of the Application  
regarding the Conversion and  
Acquisition of Control of Premera Blue  
Cross and its Affiliates

Docket No. G02-45

SPECIAL MASTER'S ORDER ON  
ALASKA INTERVENERS' MOTION  
RE ALASKA DIVISION OF  
INSURANCE CONSULTANTS'  
REPORTS

This matter comes before me on the Alaska Interveners' "Motion Concerning Alaska Division of Insurance Consultants' Reports," dated November 18, 2003. I have considered the Motion, Premera's Response, dated November 20, 2003, and the Alaska Interveners' Reply, dated November 21, 2003. (On November 21, 2003, at 8:06 PM, Premera emailed a "Motion to Strike Reply or, Alternatively, Motion for Leave to File Sur-Reply." On November 24, 2003, at 5:00 PM, the Alaska Interveners emailed their "Opposition and Counter-Motion to Strike Premera's Motion to Strike Reply or, Alternatively, For Leave to File Sur-Reply." In view of the ruling below, I have not considered Premera's late Motion.)

*Alaska Interveners Assert:*

The Special Master should reject Premera's position that neither the Alaska Division of Insurance ("ADI") consultants' reports ("Alaska reports") nor the ADI consultants themselves may be utilized at the hearing scheduled to begin January 15, 2004. Premera's position appears to have two predicates: 1) The Alaska Interveners did not submit the Alaska reports to Premera on November 10, 2003. 2) The Alaska

Intervenors do not have engagement letters with the ADI consultants. Both predicates are misguided.

1) The Commissioner's Thirteenth Order (Case Scheduling Order) does not require a party to submit a report for each expert it intends to call at the hearing. Instead, the Case Scheduling Order requires the parties to submit reports by November 10, 2003 for experts retained by the parties. But the Alaska Intervenors have not retained the ADI consultants and do not claim the consultants' reports as their own. Thus, the November 10 deadline does not operate to bar submission of the reports in the present proceeding. Though Premera has had the draft reports since October 22, 2003, the reports are not yet final and could not have been produced on November 10.

2) No Order of the Commissioner requires a party to obtain engagement letters from independent experts before calling them as witnesses.

*Premera responds:*

The Alaska reports, prepared by ADI's consultants, are confidential and inappropriate for use in the present proceeding. Such reports are being prepared in connection with the ADI's separate review of Premera's proposal. The Alaska reports are actually the supporting work papers of the ADI consultants and will not be part of the public ADI examination report. The ADI has given no indication that it intends to introduce the work papers in any proceeding. The Alaska Intervenors may not properly use them here.

The Case Scheduling Order set November 10, 2003 as the "Deadline for Premera and Intervenors to submit Final Expert Reports." The deadline for submission of expert reports has passed, along with the period to review and redact them or to challenge

proposed redactions. Alaska Interveners' suggestion that they are not required to submit reports for all testifying experts or even to identify them in advance of the hearing is absurd.

Finally, the ADI consultants should not be called as witnesses in this proceeding because they are not, and cannot be, subject to the same discovery as expert witnesses retained by the parties. The Alaska Interveners admit that they have no retention agreement with the ADI consultants, have not produced documents related to the consultants, have not made the consultants available for deposition, and do not have the ability to do so. To permit testimony from expert witnesses who are not subject to discovery would be extremely prejudicial to Premera and the other parties.

For these reasons, Premera requests a ruling precluding the use or introduction of any ADI consultant report or executive summary in this proceeding and precluding any party from calling the ADI consultants as witnesses.

*Alaska Interveners Reply:*

The final Alaska reports and the executive summaries are not confidential. Such reports are expected to be made public sometime in December 2003.

Since the Alaska Interveners did not retain the ADI consultants, they had no duty under the Case Scheduling Order to produce their reports by November 10. The reports could not have been produced by the Alaska Interveners by November 10 because they were not yet final. They were not final because Premera withheld information that the ADI consultants deemed necessary.

The Commissioner recognized in the Fourth Order, at page 7, that the Alaska Interveners have significant interests in the proposed conversion and that they can

provide relevant information in addition to the information offered by the OIC's and Premera's experts. The Alaska Interveners accordingly have the right to present evidence in support of their interests, including using the Alaska reports and calling the ADI consultants as witnesses, if necessary.

The Alaska Interveners have had the reasonable expectation that the ADI consultants' findings would be introduced into the OIC proceeding. This expectation is based, among other grounds, on a March 19, 2003 letter from Gloria Glover, Chief Financial Examiner of the ADI, to Commissioner Kreidler, conditionally permitting interviews of ADI's consultants, in which she stated, "It follows that evidence from Alaska's Consultants would have to be offered in the Washington proceeding or there would be no point in interviewing them."

The Alaska Interveners cannot now retain experts to perform the work that has already been done by the ADI consultants related to the Alaska Interveners' interests in the present OIC proceeding. If they cannot introduce the findings of the ADI consultants, they will face extreme prejudice.

*Ruling:*

The Case Scheduling Order clearly establishes November 10, 2003 as the deadline for Interveners to submit their final expert reports. This deadline was not limited to the reports of experts retained by the Interveners. All parties other than the Alaska Interveners met the November 10 deadline.

The Case Scheduling Order was intended to provide deadlines permitting the parties to prepare systematically for the hearing scheduled for January 15, 2004. The

Case Scheduling Order provides that the final discovery cutoff is December 5, 2003, less than two weeks from the date of the present Order.

The Alaska Interveners are unable to specify a date by which the Alaska reports will be issued. All that they can say is that the reports are expected to be made public sometime in December 2003, probably well over a month later than the November 10 deadline.

The Commissioner recognized that the Alaska Interveners have significant interests in this proceeding and that they might provide information relevant to his decision. This does not, however, justify relieving the Alaska Interveners from the procedural obligations imposed on all other parties.

All other parties would be prejudiced by an order permitting the introduction of reports not subject to timely review and redaction, or permitting testimony from consultants who have not been subject to timely depositions (or possibly, to any depositions at all). Such an order would undermine the fair and orderly procedure contemplated by the Commissioner.

In any case, substantial expert testimony related to Alaska is expected to be presented to the Commissioner from other sources. The following reports (prepared by the Health Policy Analysis Program, School of Public Health and Community Medicine, University of Washington, for the Premera Watch Coalition, Washington State Hospital Association, Washington State Medical Association, and the Alaska Blue Cross Conversion Task Force) discuss Premera's involvement in Alaska's health insurance market and present an Alaskan post-conversion scenario: 1) Premera Conversion Study, Report 1, "Premera Involvement in Washington and Alaska Health Insurance Markets."

This report “examines the role and recent behavior of Premera in the Washington and Alaska health care markets in order to create a base line from which to assess possible effects of conversion.” *Id.*, at page 2. 2) Premera Conversion Study, Report 2, "Review of Literature and Experiences of Other States, and Discussion of Potential Effects of a Premera Conversion.” This report “examines likely post-conversion scenarios [in Washington and Alaska] based on experiences in other states where Blue Cross and Blue Shield conversions were completed or proposed.” *Id.*, at page 2.

For these reasons, the Alaska Interveners may not introduce ADI consultant reports or call ADI consultants as witnesses in this proceeding. The Alaska Interveners may, of course, continue to participate as a party in other respects.

DATED this 26<sup>th</sup> day of November, 2003.

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George Finkle  
Superior Court Judge, Retired  
Special Master